

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MAURICE J. AND JUDY G. GOLDSTEIN</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 813496</b>
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1985.	:	

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Petitioners, Maurice J. and Judy G. Goldstein, 370 Lexington Avenue/MSI, New York, New York 10017-6503, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the Year 1985.

On October 6, 1995 and October 13, 1995, respectively, petitioner appearing by Wertheim and Company (Ronald Liebman, C.P.A.), and the Division of Taxation appearing by Stephen U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based upon documents and briefs to be submitted by April 9, 1996. The Division of Taxation submitted its documents on December 4, 1995. Petitioner submitted a brief on February 5, 1996. The Division of Taxation submitted its brief on March 8, 1996. Petitioner, in turn, submitted a reply brief on April 12, 1996, which date commenced the six-month period for issuance of this determination (Tax Law § 2010.[3]). After due consideration of the evidence and arguments, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly denied petitioners' claim for refund of an overpayment of tax for the year 1985 upon the basis that such claim was not timely filed.

***FINDINGS OF FACT***

1. By a letter dated October 24, 1994, the Division of Taxation ("Division") provided to petitioners, Maurice J. and Judy G. Goldstein, its Notice of Disallowance of a claim for refund

filed by petitioners for the Year 1985. This letter explains the Division's basis for disallowance as follows:

"A claim for refund based on a federal audit must be filed within 2 years and 90 days of the final federal determination. The final federal determination was dated June 30, 1990 and your claim was received on December 29, 1993. Therefore, the deadline for filing for a refund expired before you filed."

2. The Division's disallowance letter is apparently in response to petitioner's filing of a Report of Federal Changes (Form IT-115).<sup>1</sup> On the Report of Federal Changes, petitioners indicated a final Federal adjustment for the tax year 1985 with respect to Cralin Capital Partners. Specifically, petitioners reported that their 1985 income was decreased by \$69,200.00, with said amount representing the difference between "Cralin Income on Return" (\$80,000.00) and "Income Required Per IRS Agreement" (\$10,800.00). In turn, the Report of Federal Changes indicates that petitioners' 1985 Federal tax liability was decreased from \$22,224.00 (as reported) to \$8,384.00, thus resulting in a reported Federal overpayment of \$13,840.00. This Report goes on to show that based on the Federal adjustment, petitioners' 1985 New York State tax liability should be decreased from \$8,496.00 (as reported) to \$3,244.00, thus resulting in a claimed refund of \$5,252.00.

3. The record includes an IRS Income Tax Examination Changes report for the year 1985 pertaining to petitioners. This one-page report, dated June 30, 1990, reflects the above-described \$69,200.00 decrease to petitioners' 1985 income related to Cralin Capital Partners, and goes on to calculate the \$13,840.00 Federal overpayment for 1985. At the base of this report, the following statement appears:

"The enclosed report reflects the refund resulting from the examination of Cralin Capital Partners for 1985 for which we received the settlement agreement Form 906 executed 12/14/90. We have taken your amended return into consideration."

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<sup>1</sup>The Report of Federal Changes is the only document in the record which would give rise to a Division response in the form of a Notice of Disallowance as above (i.e., the record does not include nor do the parties make reference to the filing of any other refund claim document such as a Claim for Credit or Refund [Form IT-113X] or an amended income tax return [Form IT-201X]). In addition, while the Report of Federal Changes in the record is not dated, petitioners do not contest the statement that December 29, 1993 was the date of receipt thereof by the Division, as noted in the Division's refund disallowance letter, nor do petitioners assert that such Report or any claim for refund was filed in a timely manner for the year 1985.

The record herein does not include the Settlement Agreement Form 906 nor any amended Federal return, as referenced above on the face of the IRS Income Tax Examination Changes.

4. Petitioners challenged the Division's denial of their claim via the filing of a petition, on which petitioners state "[t]he refund for 1985 was based on a prior year change in income. In 1984 I had to pay an additional tax. Then I should be entitled to refund in 1985." In response to the petition, the Division's answer asserts that the petitioners have not proven that they timely filed their refund claim or that they are otherwise entitled to the refund claimed.

5. Petitioners offered no documents in evidence. Petitioners' representative, in his brief, asserts that petitioners seek application of the equitable doctrine of recoupment. That is, although acknowledging that a refund of petitioners' overpayment for 1985 is time barred by operation of the statute of limitations, petitioners maintain that the amount of such refund may be allowed as an offset to a deficiency where the deficiency and the refund arise out of the same transaction. Petitioners' representative asserts that the transaction giving rise to the issue herein was a "straddle" aimed to reduce tax liability by generating a loss in an earlier year (1984) while deferring matching gain to a later year (1985). Petitioners' representative states, in his brief, that petitioners were audited by the IRS and that they agreed to a pretrial settlement of all years. Petitioners' representative describes such result as a coordinated settlement of a purchase and sale transaction wherein petitioners conceded certain tax deficiencies while the IRS conceded matching overpayments, going on to note that each such concession was dependent on the other. Petitioners' representative admits that reports of the Federal changes were not timely filed with New York by petitioners, and states that "[c]onsequently, when New York State assessed the deficiencies, the statutes of limitations for the refund years were closed." In turn, petitioners' representative maintains such circumstances require application of the doctrine of equitable recoupment, stating that it would be ". . . unfair, immoral and unconscionable for New York State to adopt one leg of this coordinated settlement (the deficiency) without adopting the other leg (the refund)."

6. In contrast to petitioners' position, the Division points out that petitioners did not report their Federal changes, which were finalized as of June 30, 1990, to New York until December 29, 1993 thereby leaving such report and any claim for refund based on such changes untimely. The Division goes on to oppose petitioners' claim that equitable recoupment should be allowed, arguing that petitioners have failed to establish that the refund claimed for 1985 was generated from the same transaction as the alleged deficiency for 1984. The Division also argues that in any event such circumstances require dealing with different years or periods, whereas equitable recoupment only allows for an offset of a liability (as opposed to a refund) for the same year or period and transaction. Finally, the Division argues that petitioners have not established that but for the statute of limitations bar a refund would be due for 1985, or that petitioners seek only an offset of a liability rather than a refund for 1985.

7. Petitioners' representative maintains, in his reply brief, that one Federal audit report covered both years (i.e., 1984 and 1985), adjusted all aspects of the same transaction, and contained all of the information necessary to establish petitioners' entitlement to a refund for 1985. Petitioners' representative also maintains that petitioners are not actually seeking a refund, but are seeking to apply a 1985 overpayment against taxes that the Division allegedly seeks to collect for 1984 (i.e., an offset).

### ***CONCLUSIONS OF LAW***

A. Where the amount of a taxpayer's Federal taxable income is changed or corrected by the IRS, such taxpayer is required to report the Federal change to the Division within ninety days after the final determination of such change (Tax Law § 659). In turn, any claim for a refund of tax attributable to a Federal change must be filed with the Division within two years from the time when such Federal change was required to be reported to the Division (Tax Law § 687[c]). Thus, petitioners in this matter had a period of two years and ninety days from the June 30, 1990 final date of the Federal change within which to report such change and claim a refund with respect thereto. However, petitioners have admitted that they neither reported the Federal change nor filed a claim for refund based thereon at any time prior to December 29,

1993, and that therefore any such claim for refund is time barred by operation of the statute of limitations. However, petitioners have continued to challenge the Division's disallowance of their claim for refund, and appear to take the position that they do not seek a refund but rather, via the equitable theory of recoupment, seek to offset a 1984 deficiency by application of a 1985 overpayment.

B. In general, the Tax Law provides that an overpayment of tax may be recovered under various provisions so long as the action is brought within the time therefor as prescribed by statute. The relevant time period in this case is set forth above, and it is clear that petitioners did not meet such time period. However, even though the time for filing a claim for refund has expired, a taxpayer may have a right to plead a claim for recoupment of such an overpayment against a deficiency for the same period arising out of the same transaction (see generally, 58 NY Jur 2d, Taxation, § 72).

C. In Bull v. United States (295 US 247, 262, 79 L Ed 1421), the U.S. Supreme Court stated:

"recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely" (emphasis added); see also, Stone v. White (301 US 532, 81 L Ed 1265).

In Rothensies v. Electric Storage Battery Company, 329 US 296, 91 L Ed 296) the Court observed that recoupment has:

"never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made subject of a suit by a plaintiff to be examined in all its aspects and judgment to be rendered that does justice in view of the one transaction as a whole".

In a more recent U.S. Supreme Court case, United States v. Dalm (494 US 596, 108 L Ed 2d 548), the Court stated:

"our decisions in Bull and Stone stand only for the proposition that a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and inconsistent, but now time-barred tax claim relating to the same transaction" (id. at 608).

D. The Tax Appeals Tribunal has addressed the issue of equitable recoupment, observing as follows:

"[t]he basic rule concerning recoupment is that credit for overpayment of taxes in a previous year which is barred by the statute of limitations may not be recouped against taxes due for a different year on different transactions not under audit (Matter of Mobil Oil Corp. v. State Tax Commn., 62 AD2d 668, 406 NYS2d 365). Stated alternatively, credit for overpayment may be recouped against taxes for the same period on the same transactions under audit (National Cash Register Co. v. Joseph, 299 NY 200)" (Matter of Abbe L. Kadish, Tax Appeals Tribunal, November 15, 1990).

Recently, in Matter of Turbodyne, (Tax Appeals Tribunal, June 25, 1996), the Tribunal stated that:

"[t]he doctrine of equitable recoupment allows a taxpayer against whom a deficiency is asserted to offset against that deficiency overpayments which are time barred for claiming a refund and (1) involve the same type of tax as the deficiency; (2) were paid during the period that comprises the deficiency; and (3) involve the same transaction as is the subject of the deficiency (citations omitted)".

However, the Tribunal went on to deny the claim for recoupment in Turbodyne because the taxpayer therein had no overpayment of tax for the same period as the deficiency entailed.

E. In view of the foregoing authorities, petitioners' claim must be rejected. First, and fatal to petitioners' claim, is the fact that petitioners' "main action itself", the claim for refund, is not timely (Bull v. United States, supra), and thus petitioners are not "litigating a tax claim in a timely proceeding" (United States v. Dalm, supra). Furthermore, and equally fatal to petitioners' claim is the absence of any information concerning the "deficiency" against, and to the extent of which, recoupment is sought. That is, the record contains no evidence establishing that there was a New York deficiency for 1984 or setting forth the dollar amount of any such deficiency.<sup>2</sup>

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<sup>2</sup>The only information describing the the basis for the 1985 Federal change set forth in the IRS examination report and carried through to petitioners' late-filed New York Report of Federal Changes comes from statements made by petitioners' representative in his brief. More specifically, it is alleged that the 1985 Federal change resulted from an IRS examination of tax straddle transactions involving petitioners. Such transactions, by their nature, typically involve purchases and sales covering different years aimed at disposing of loss positions in an earlier year (so as to offset other income), with disposals of gain positions in a later year (so as to defer tax liability on such gain). Petitioners, in turn, would apparently argue that any general prohibition against applying the doctrine of recoupment because different tax years are involved would be overcome in the straddle context since the offsetting losses and gains arise out of the same transactions simply timed so as to span different years. It does appear that the IRS, when it disallows a straddle loss in one year, will cancel the related gain in another year (see, Katz v. Commissioner, 90 TC \_\_ No. 75; Lasker v. Bear, Stearns & Co., 757 F2d 15, 17). However, as noted, the only information about the 1985 Federal change comes from petitioners' representative's brief, in the form of statements which at best cryptically describe the underlying facts. In addition, and more importantly, the record is bereft of any evidence with regard to the preceeding year (1984) in which straddle losses were allegedly disallowed thus resulting

One might assume that petitioners' request herein for an offset, although initially phrased as a claim for refund, leads to an inference that there had to be a 1984 deficiency equal to or exceeding the \$5,252.00 amount claimed as an overpayment for 1985 (i.e., that there was a 1984 loss disallowance at least matching the 1985 audit reduction of gain). However, it remains that there is no evidence in the record from which to conclude that such is the case, or that there was in fact a deficiency asserted by the Division for 1984. Petitioners did not report the 1985 Federal change until some three and one-half years after the same was finalized. Furthermore, there is no evidence as to when, or if, petitioners reported the alleged underpayment based on loss disallowance for the preceeding year (1984), and one could infer that there was no such reporting. The absence of any information for 1984 leaves no basis upon which to conclude that recoupment based on a deficiency for such year could or should be allowed. In sum, there is no timely main action (either the subject refund claim which is concededly time barred or the alleged 1984 deficiency for which the record contains no evidence of existence or timely challenge thereto) upon which to hinge a recoupment.

Finally, the lack of any evidence for 1984 presents a jurisdictional hurdle precluding application of the doctrine of recoupment. Specifically, recoupment would require a determination of a deficiency for a year not otherwise in issue in this proceeding, in this case 1984. Such a determination is prohibited by Tax Law § 689(g), which section provides explicitly that there is "no jurisdiction [in the Division of Tax Appeals] to determine whether or not the tax for any other year has been overpaid or underpaid" (Matter of Peter V. Hemmers, Tax Appeals Tribunal, March 1, 1990).

F. In addition to the foregoing, there is no allegation that petitioners did not have an adequate procedural remedy in the first instance. In this regard, there is no claim or evidence to show that by the time petitioners became aware of any right to a refund such claim was time barred. Petitioners assert that the Federal settlement was an integrated or coordinated settlement, yet offer no information or explanation as to why the Federal changes were not

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in an alleged deficiency for such year.

reported to New York in a timely manner. Furthermore, there is no assertion that petitioners could not have timely made claim for refund or, for that matter, could not have challenged any deficiency that may have been issued for 1984. Petitioners simply appear to have failed (or chosen not) to report the Federal change(s) in a timely manner for either year and pursued their claim(s). As a result, the "main action itself" is (concededly) untimely and equitable recoupment is not available simply as a means to abrogate the statute of limitations (Bull v. United States, supra). Equitable recoupment is not intended to apply in situations where, as here, a taxpayer could have timely filed but simply did not do so. To grant petitioners' request for refund (or offset) on the record herein would be to render the statute of limitations entirely meaningless.

G. The petition of Maurice J. and Judy G. Goldstein is hereby denied and the Division's letter of October 24, 1994 denying petitioners' claim for refund is sustained.

DATED: Troy, New York  
September 19, 1996

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE